MOTION FILED

AUG 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNDN AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOR LEAVE TO FILE BRIEF *AIICI CURIAE*, AND BRIEF *AMICI CURIAE*

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and the American Civil Liberties Union of Virginia respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amici curiae. Counsel for the Appellant has consented to the filing of this brief. */ Counsel for the appellee indicated, in a telephone conversation, that the appellee would consent only on the condition that this brief be

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*/ A copy of that letter is being filed with the Clerk.

filed no later than the due date of July 28, 1977. Because of the press of other litigation responsibilities with respect to cases in this Court and other courts, this brief could not be prepared, produced and filed by July 28. It is, however, being sent to our printer on that date, and it should be filed with the Court no later than August 1, 1977, if not sooner. But since the appellee's consent was conditional on this brief's being filed by July 28, this motion is required by the Rules.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's guarantee of a free press, a condition prerequisite to the continued maintenance of a free society. The ACLU has participated in countless cases involving the First Amendment, in this and other courts.

The American Civil Liberties Union of Virginia, the statewide affiliate of the national ACLU, has a particular interest in the resolution of the issues here. It provided counsel to the plaintiffs in Nationwide Communications, Inc. v. Backus, C.A. No. 77-0139-R (E.D. Va.), a federal district court action challenging the constitutionality of Virginia Code Section 2.1-37.13, the statute at issue here. Although prelim-

inary relief was granted, the action was dismissed by agreement due to the pendency of this appeal. See, Jurisdictional Statement, p. 10.

The issues in this case, involving truthful reporting about the official conduct of public officers, are of vital importance to the continued maintenance of a free press as a crucial prerequisite to a free people. We would hope that our analysis of those issues will be of assistance to the Court in resolving the questions before it. And it is in order to present that analysis that amici respectfully move for leave to file this brief.

Respectfully submitted,

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INTEREST OF AMICI */

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STATEMENT OF THE CASE

On October 4, 1975, appellant Landmark Communications, Inc. ran a story in its newspaper, The Virginian-Pilot, relating the uncontested fact that a local juvenile judge was being investigated by the Judicial Inquiry and Review Commission upon allegations of judicial misconduct. The Commission is the state agency charged with investigating charges of misconduct

leveled against Virginia's judiciary. The story identified the judge by name, stated that no formal charges had been filed against him, and further stated that this indicated either that the Commission's investigation was still continuing or that it had found insufficient cause to proceed further.

Landmark was subsequently indicted for publishing the name of the judge in violation of Virginia Code Section 2.1-37.13. This statute provides that "(a)ll papers filed with and proceedings before the Commission...including the identification of the subject judge as well as all testimony and other evidence...shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the [Virginia] Supreme Court shall lose its confidential character..." Violation of this proscription is a misdemeanor, carrying a maximum punishment of a year in jail and a fine of $1,000.

At trial, no evidence was presented by the prosecution other than a stipulation in which Landmark admitted that it published The Virginian-Pilot, that it ran a story identifying a judge under Commission investigation, and that at that time the Commission had not filed a formal complaint in the Virginia Supreme Court. An editor of the paper testified that he ran the story because he felt that it was of important news value and he did not

believe Section 2.1-37.13 applied to newspaper publication. On January 15, 1976, Landmark was found guilty as charged and fined $500 plus the costs of prosecution.

The conviction was appealed to the Supreme Court of Virginia, which affirmed. That court first refused to narrow the scope of Section 2.1-37.13, so as to provide criminal penalties only for the release of Commission information by those directly involved in an investigation. Instead, the court held that release of any such information by any person, including newspapers, violates the section. The court also rejected Landmark's contention that the statute was unconstitutional as a violation of the First Amendment guarantee of a free press. Purporting to apply a clear and present danger test, the court found that the section's proscription is "indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings...." (J.S. App.18a). The court, however, admitted that there was no specific evidence in the record to support that conclusion.

ARGUMENT

SECTION 2.1-37.13, ON ITS FACE AND AS APPLIED HERE, VIOLATES THE FREE PRESS GUARANTEE OF THE FIRST AMENDMENT.

Introduction

The central issue in this case is both important and straightforward: may the press be subject to criminal sanctions for the publication of truthful statements concerning a public official in connection with the performance of his public duties. Resolution of the question implicates the core values of our democratic system of government and the function of the free press as a mainstay of that system.

It is equally important, however, to note what is not involved in this case. We do not deal here with the imposition of sanctions for intentionally or recklessly false statements about public officials. Cf. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Nor, conversely, do we deal with the disclosure of true but personal or embarrassing facts about private individuals. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Similarly, the case for suppression of publication does not rest on any countervailing concern for the protection of other constitutional rights, such as the right of a criminal defendant to a fair

trial. Cf. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976). Finally, the case does not even directly involve the protection of witnesses or complainants before an investigating agency.

Rather, in the context of this case, involving the reporting of truthful information about public officials and the discharge of their public responsibilities, the First Amendment operates in its most compelling and insistent fashion. The publication of such information can clearly not be restrained in advance. See New York Times Co. v. United States, 403 U.S. 713 (1971). But here, Virginia seeks to accomplish through subsequent criminal punishment what it could not achieve through prior restraint. For the following reasons, the First Amendment will not permit such a result.

A. The punishment sustained below constitutes an unprecedented form of interference with the proper functioning of a free press.

The constitutional protection given our nation's press is, of course, one of the most cherished values in the Bill of Rights. As stated by Mr. Justice Sutherland over forty years ago:

> ...since informed public opinion is the most important of all restraints upon misgovernment, the suppression or abridgement of

> the publicity afforded by a free press cannot be regarded otherwise than with grave concern.... A free press stands as one of the great interpreters between government and the people. To allow it to be fettered is to fetter ourselves. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

Since the Holmes-Brandeis dissent in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921), this Court has accorded newspapers special protection under the First Amendment, in recognition of the fact that the nation's political and judicial institutions will be free only insofar as its press is free of governmental censorship. The Court has consistently resisted attempts by federal and state government to invade or diminish the right of newspapers freely to choose the material they will print. Whether the attempts have taken the form of prior restraints, Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976), subsequent punishments, Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Mills v. Alabama, 384 U.S. 214 (1966); Bigelow v. Virginia, 421 U.S. 809 (1975); discriminatory taxes, Grosjean v. American Press Co., supra, inhibiting forms of libel actions, New York Times Co. v. Sullivan, 376 U.S.

254 (1964), or forced replies from irrate readers, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court has consistently recognized that a central purpose of the First Amendment is to insure and encourage a free press as a fundamental instrument of political liberty. As stated by Mr. Justice Black for the Court in Mills v. Alabama, supra at 219:

> Suppression of the right of the press to praise or criticise governmental agents and to clamor and contend for or against change ...muzzles...the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

In fact, no case since Burleson, has upheld the power of federal or state government to forbid the exercise of free editorial choice with respect to truthful reporting or punished the press for exercising that choice. 1/ That historical

1/ Pittsburg Press Co. v. Pittsburg Commission on Human Rights, 413 U.S. 376 (1973), did uphold the power of government to prohibit discrimatory classified advertisements. However, this decision rested upon the fact that commercial advertisements were involved which did not express a position on a "matter

(footnote continued next page)

fact is a special feature of our political system and its theme was re-emphasized by Mr. Chief Justice Burger in Tornillo:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.
> 418 U.S. at 258.

Amici contend that newspapers simply cannot be criminally punished under any circumstances for exercising editorial choice to publish news, including truthful information concerning the name of a judge against whom charges of official miscon-

of social policy" and which did not involve any editorial "judgmental discretion" in the content and placement of the want ads. The opinion reaffirmed "the protection afforded to editorial judgment and to the free expression of views on these and other issues however controversial." 413 U.S. at 931.

duct have been made and who is being investigated by government officials. In Mills v. Alabama, supra, the Court held that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper to do no more than urge people to vote one way or another in a publicly held election." 384 U.S. at 220. The same principle is applicable here, and the Court need go no further to resolve the issues in this case and reverse the judgment below.

B. The State's interests are inadequate to justify the total censorship imposed by Section 2.1-37.13.

Even assuming arguendo that further inquiry is required, and whether measured by the classic clear and present danger test or the more recent "imminent lawless action" test of Brandenburg v. Ohio, 395 U.S. 444 (1969), the state can show no interest sufficient to justify punishment of the press for communicating the kind of information involved here. The Court has refused to permit speech censorship based on content except in the most limited circumstances. Only where there is obscenity, Miller v. California, 413 U.S. 15 (1973), advocacy of imminent lawless action likely to incite violence, Brandenburg v. Ohio, supra, "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), defam-

tory speech uttered with "actual malice," Gertz v. Robert Welsh, Inc., 418 U.S. 323, 340 (1976), or advertisements proposing illegal activities, cf., Pittsburg Press Co. v. Pittsburg Commission on Human Relations, 413 U.S. 376 (1973), has the Court sustained content restrictions on speech. Rather, the Court has prohibited press censorship in a wide variety of circumstances, even when government sought to protect substantial state interests, ranging from national security, New York Times Co. v. United States, supra, to a defendant's right to a fair trial, Nebraska Press Assn. v. Stuart, supra.

Measured against this background of deference to First Amendment values, the state's interest in shielding investigations of the Judicial Inquiry and Review Commission from public disclosure is woefully inadequate. The Virginia Supreme Court listed the state's interest here as threefold:

> (T)he requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and wit-

> nesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious. (J.S. App. 18a).

The first two rationales do not, in any way, aid the Commission itself in its mission of policing the State's judiciary. They speak only to protecting individual judges and the judiciary generally from public disfavor allegedly bred by frivolous complaints. Even if the underlying state interest in maintaining respect for the judiciary is legitimate, the means chosen to effectuate that interest unnecesarily and impermissably infringe First Amendment guarantees.

The state cannot seek to legislate respect for any governmental agency. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, ___ U.S. ___, 97 S.Ct. 1428 (1977). It can develop and maintain institutions of government which warrant respect, but it cannot, by censorship or regulation of the press, attempt to manipulate or coerce such respect.

On the contrary, the very purpose of the First Amendment is to encourage the widest possible range of debate on public issues and public officials:

> Whatever differences may exist about interpretations of the

> First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes... Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Mills v. Alabama, supra at 218-219.

This protection extends to information which is unfair, caustic and even "untrue":

> (D)ebate on public issues should be uninhibited, robust, and wide-open, and...it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials... Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries or admin-

istrative officials... New York Times Co. v. Sullivan, supra at 270.

Allowing an unrestrained flow of information is of particular importance when dealing with the judiciary and judicial agencies. Only courts can dispense criminal penalties, an awesome power that is potentially subject to serious abuse. See, Powell v. Alabama, 287 U.S. 45 (1932). Even in civil cases, courts can by a single decision affect both private and public interest to an extent often unmatched by other branches of government. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954). The fact that the judiciary, unlike the other two branches of government, frequently is not directly responsible to the electorate justifies increased scrutiny of judicial affairs to insure that judicial power is exercised consistent with law. It is the duty of the press to publish information necessary for public scrutiny of judicial conduct. It is in recognition of this duty that "(t)ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." Nebraska Press Assn. v. Stuart, supra at 559.

This principle was emphasized in a highly analogous context in Cox Broadcasting Corp. v. Cohn, supra, in which the reporting of the name of a rape victim, found in court records, was held protected

by the First Amendment notwithstanding a Georgia statute prohibiting such publication. In Cox the court recognized the critical role of the media in commenting on court proceedings, noting that most citizens view court proceedings through the press rather than personally. 420 U.S. at 491-92. Accordingly, the Court held that "States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." Id. at 495.

The rationale of the Cox case cannot be limited to the right to report information gleaned from public court proceedings and official records and documents open to the public. While such sources are "the basic data of governmental operations," 420 U.S. at 492, they are not the only data. Protection for the vital press functions which this Court identified in Cox cannot be made to vary depending on the source of the information reported. In either case, the press role remains the same:

> With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 492.

This special function extends well beyond mere reporting and includes the expression of opinions and criticism:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

Even in the context of ongoing criminal trials, where defendants are subject to a barrage of publicity which could abridge their constitutional right to a fair trial, this Court has refused to allow censorship of the press. Nebraska Press Assn. v. Stuart, supra. The state's interest in maintaining the reputation of the state's judges is insignificant in comparison to a defendant's constitutional right to a fair trial. It follows, as this Court ruled in Bridges v. California, 314 U.S. 252 (1941), that the state's interest in maintaining respect for the judiciary or shielding the reputation of

its members is not sufficiently weighty to shield the judiciary from public scrutiny or even criticism:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. Id. at 270-71.

The third rationale advanced by the Virginia Supreme Court, that censorship is necessary to protect complainants and witnesses from recrimination, is related to the actual workings of the Commission, but that interest is, in this case, both irrelevant and insufficient. The conviction at issue here had nothing to do with that purported interest. Appellant was convicted for releasing the name of the judge being investigated. Appellant did not print the name of the complainant and witnesses before the Commission. (J.S. App. 21a). Accordingly, that interest is irrelevant to this case. Moreover, as we will now show, that interest is insufficient to justify a total ban on press reporting, but this Court need not resolve this issue

in order to reverse the judgment below.

Although attempting to preserve the anonymity of witnesses and complainants may aid the Commission's procedural machinery, the Commission has not demonstrated, as required by the First Amendment, that such anonymity is essential. Nor could it. Section 2.1-37.13 itself forces witnesses and complainants into public view when the Commission files formal charges. Complainants and witnesses know that if the Commission believes their allegations have merit, their names and allegations will be made public. Accordingly, complaintants and witnesses have no expectation of anonymity, and the Commission cannot show that anonymity is essential. Similarly, if proceedings upon a formal complaint can withstand the rigors of public scrutiny, there is no reason why earlier proceedings cannot.

The anomalous effect of Section 2.1-37.13 is to give greater protection to frivolous complaints, and to the witnesses and complainants who bring them, than to those which the Commission finds meritorious. A complainant who makes malicious charges without any factual support will be completely protected from recrimination because his complaint will never be formally filed or released. Honest complainants, who bring real misconduct to the Commission's attention, resulting in the filing of public charges, are the only ones who are potentially subject to the

wrath of vindicative judges. 2/

There is no public interest in protecting the anonymity of frivolous complainants, while disclosing the names of bona fide complainants.

Finally, whatever value there may be, this third interest does not require or justify the blanket censorship imposed by Section 2.1-37.13. The First Amendment requires not only that speech restrictions be supported by compelling interests; it requires also that the state confine restrictions upon speech as narrowly as possible, using the least restrictive means of regulation possible. Shelton v. Tucker, 364 U.S. 479, 488-490 (1960). The statute at issue here flagrantly violates this principle. It censors all information on Commission proceedings, not just the names and identifying data of complainants and witnesses. Such a broad sweep is unnecessary to protect the confidentiality of these individuals.

2/ Furthermore, to the extent that the "recrimination" feared by the Virginia Supreme Court will be recrimination by the judge under investigation, that judge will no doubt know the names of those who have filed complaints, whether or not those names are published. Thus, public anonymity will not preclude private recrimination.

c. Section 2.1-37.13 is unconstitutionally overbroad.

The overbreadth of this statute is readily apparent. As interpreted by the Virginia Supreme Court, it authorizes criminal penalties for revealing the name of any judge investigated by the Commission, and any evidence adduced in the course of an investigation, unless the Commission elects to file public charges against the judge. As such, it prohibits the public release of relevant information in the course of legislative or executive deliberations concerning the election or appointment of judges[3] or Commission members. It potentially censors news accounts of bribes received by Commission members which prevent investigations of corrupt judges. It prevents dissatisfied complainants from publicly criticizing the Commission or the judge involved in all but the most general terms. It simply "sweeps within its prohibitions what may

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3/ For provisions on the method of selection for Virginia judges, see Constitution of Virginia, Art. VI, Section 7, Virginia Code Sections 17-120 - 17-122 and 16.1-69.9. Although there are differences between courts of record and those not of record, the Virginia system, in essence, provides for election by the state legislature.

not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). Thus the statute suffers from the fatal constitutional defect of overbreadth.

This Court has required that provisions impinging upon areas protected by the First Amendment must be drawn with sufficient narrowness and precision to insure that First Amendment freedoms retain the "breathing space" necessary for robust survival. E.g., Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960); Broadrick v. Oklahoma, 413 U.S. 601 (1973). As was true of the statute in Spence v. Washington, 418 U.S. 405, 414, n. 9 (1974), Section 2.1-37.13 is of "limitless sweep" and is therefore unconstitutionally overbroad. See also, Gooding v. Wilson, 405 U.S. 518 (1972); Keyshian v. Board of Regents, 385 U.S. 589 (1967); Cox v. Louisiana, 379 U.S. 536 (1965).

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and Section 2.1-37.13 declared unconstitutional.

Respectfully submitted,

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